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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Toy Concepts

Serial No. 75/501,025

Myron Amer of Myron Amer, P.C. for applicant.

Jennifer H. Dixon, Trademark Examining Attorney, Law Office
107 (Thomas Lamone, Managing Attorney).

Before Seeherman, Holtzman and McLeod, Administrative
Trademark Judges.

Opinion by McLeod, Administrative Trademark Judge:

An application has been filed by Toy Concepts to
register the mark shown below for "stuffed toys, namely, a
pony, a monkey, a frog, and a zebra."¹



¹ Application Serial No. 75/501,025, filed June 12, 1998,
claiming dates of first use of January 15, 1997. The terms BEND &
POSE PETS are disclaimed apart from the mark as shown.

The Examining Attorney issued a final refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the previously registered mark BEND 'N POSE for "dolls"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

Applicant does not seriously dispute the fact that the word portions of the involved marks are similar. Indeed, applicant stated during prosecution that "the marks admittedly are very similar." (Applicant's Response, March 19, 1999). According to applicant, however, the common words "bend and pose" are descriptive and therefore "weak" as a source-identifier. Applicant argues that the design element and term PETS add a visual difference and special connotation to applicant's mark. Applicant also maintains, among other things, that the essential characteristics of the applicant's goods ("stuffed toy animals") and the registrant's goods ("dolls") are different.³ In support of

² Registration No. 1,876,739 issued January 31, 1995, on the Principal Register, and setting forth dates of first use of February 1993.

³ We reject applicant's contention that some of the arguments raised in the Examining Attorney's appeal brief are beyond the

its position, applicant submitted a copy of a patent, with its appeal brief, presumably covering applicant's identified goods.⁴

The Examining Attorney, on the other hand, contends that the involved marks are substantially similar in sound, appearance, meaning and commercial impression. The Examining Attorney maintains that both marks contain the same dominant text portion "bend and pose." The only difference between the text portion of the involved marks, according to the Examining Attorney, is the use of an ampersand "&" in applicant's mark versus "'N" in the registered mark. The Examining Attorney argues that applicant's addition of the word PETS to the registered mark BEND 'N POSE does not distinguish the marks. The Examining Attorney also contends, among other things, that the goods are closely related. It is the Examining Attorney's position that "dolls" and "stuffed toy animals" are both

issues joined on appeal. There is no new ground of refusal, and both the Examining Attorney and applicant may advance additional *arguments* on brief. In fact, we note that applicant also raised additional points in its appeal brief that were not raised during prosecution.

⁴ Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal, and that if applicant wishes to introduce additional evidence after an appeal is filed, it should file a request for remand. See TBMP §§ 1207.01 & 1207.02. While applicant's evidence was untimely filed with applicant's appeal brief, we have considered the evidence in reaching our decision because the Examining Attorney has treated the evidence as part of the record.

marketed in the same channels of trade and to the same class of purchasers. In support of her position, the Examining Attorney relies upon various third-party registrations introduced during prosecution.

In determining whether there is likelihood of confusion between two marks, we must consider all relevant factors as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis under Section 2(d), two of the most important considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. Because applicant and the Examining Attorney have focused on these two factors, we have done the same.

Turning first to the goods, we agree with the Examining Attorney that the goods are related for purposes of likelihood of confusion. The third-party registrations submitted by the Examining Attorney show that a particular company may be the source of both "dolls" and "stuffed toy

animals,"⁵ and that it would sell such goods under the same mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Furthermore, it is obvious that "dolls" and "stuffed toy animals" are sold in toy stores, and may be purchased by or for the same class of consumers, i.e., children themselves or adults purchasing items for children. The identified goods in both applicant's application and the cited registration would include products which are relatively inexpensive, off-the-shelf toys which are the subjects of impulse purchases.

With respect to the marks, we recognize that marks must be viewed in their entirety. Nevertheless, as the Examining Attorney points out, one feature or component of the mark may have more source-identifying significance than other elements which comprise the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In the case of a mark combining words with a design, the literal elements are often the dominant and most significant features because consumers use words when they are ordering or otherwise referring to the products. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987).

⁵ We note that very few of the third-party registrations submitted by the Examining Attorney are merchandising or house marks, which are less probative on the issue of the relatedness of the goods.

In this case, the words BEND & POSE PETS are the most significant and predominant portion of applicant's mark. Both the applicant's mark and the registrant's mark contain the phrase "bend and pose," and thus share obvious similarities in sound and appearance. Moreover, contrary to applicant's contention, we find that the marks offer the same connotation, i.e. applicant's "stuffed toy animals" and registrant's "dolls" bend at the joints and pose in different positions. We recognize that the additional term PETS and the design element in applicant's mark present some visual differences between the marks. However, the descriptive term PETS and the design are simply not sufficient to distinguish the marks, and we remain of the view that the marks are similar in sound, appearance and connotation.

It is true that the words BEND & POSE PETS have been disclaimed as merely descriptive in applicant's mark. In contrast, the registered mark BEND 'N POSE issued on the Principal Register without a claim of acquired distinctiveness under Section 2(f), indicating that the Examining Attorney for that mark deemed it to be inherently distinctive. Although the registered mark is, at the very least, highly suggestive for "dolls," it is nonetheless entitled to some measure of protection. That protection

extends to this situation, where applicant is seeking to register a very similar mark for closely related goods. See *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 340-41 (CCPA 1978).

In short, we conclude that consumers encountering applicant's mark BEND & POSE PETS and design on "stuffed toy animals" are likely to believe that they emanate from, or are associated with, the same source as the registrant's BEND 'N POSE "dolls."

Decision: The refusal to register is affirmed.

E. J. Seeherman

T. E. Holtzman

L. K. McLeod
Administrative Trademark
Judges, Trademark
Trial and Appeal Board